COURT OF APPEALS
DECISION
DATED AND RELEASED

April 16, 1997

NOTICE

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-0993

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

GLENN and GEORGIA RECHLITZ,

Plaintiffs-Appellants,

v.

GEORGE HUXHOLD, d/b/a HUXHOLD BUILDERS, INC., AUGUST and LISA SCHMIDT, and THE MARYLAND COMMERCIAL INSURANCE,

Defendants-Respondents.

APPEAL from a judgment of the circuit court for Kenosha County: MICHAEL FISHER, Judge. *Affirmed.*

Before Snyder, P.J., Brown and Nettesheim, JJ.

NETTESHEIM, J. Glenn and Georgia Rechlitz appeal from a summary judgment dismissing their negligence action against George Huxhold, d/b/a Huxhold Builders, Inc. (Huxhold) and August and Lisa Schmidt. On appeal, the Rechlitzes argue that the trial court erroneously ruled that Huxhold and the Schmidts

were entitled to summary judgment because the Rechlitzes had not offered any expert evidence in support of their claim that Huxhold caused their damage.

We affirm the grant of summary judgment because the Rechlitzes affirmatively represented to the trial court that they needed expert testimony to support their claim. On the same basis, we reject the Rechlitzes' further argument that the trial court erred by failing to rule on their motion to amend their complaint.

FACTS AND PROCEDURAL HISTORY

Because we decide this case principally on procedural grounds, we need not recite the historical facts in detail. It suffices to say that the Rechlitzes allege that in the course of constructing a residence on property adjacent to their property, Huxhold negligently graded the landscape of the property so as to change the elevation, thereby causing flooding and resultant damage to the Rechlitzes' property. Although naming the Schmidts as defendants, the complaint did not allege any negligent acts against them.

The Schmidts first moved for summary judgment, and the matter was scheduled for a hearing on December 1, 1995. Later, Huxhold moved for summary judgment. Huxhold also moved for dismissal based on the Schmidts' alleged failure to name their witnesses in accord with the scheduling order. Huxhold's motion hearing was scheduled for December 14, 1995.

After hearing the arguments on the Schmidts' motion on December 1, the trial court took the matter under advisement until the court had heard Huxhold's motions. After hearing the arguments on Huxhold's motions on December 14, the court granted summary judgment to both the Schmidts and Huxhold. At a later hearing on the Rechlitzes' motion for reconsideration, the trial court confirmed its prior rulings. We

will recite the details of these proceedings in our ensuing discussion of the Rechlitzes' appellate issues.

DISCUSSION

Ordinarily, we would begin our discussion with a statement regarding our standard of review under summary judgment methodology. However, because we decide this case on procedural grounds, we need not engage in that discussion.

The trial court ruled that the Rechlitzes were required to present expert testimony in support of their allegation that Huxhold's negligence caused their damage. The Rechlitzes argue that this ruling was error. However, during the separate summary judgment hearings and in their briefs in opposition to the summary judgment requests, the Rechlitzes expressly acknowledged that they needed expert testimony to sustain their claim.

For instance, in their brief in opposition to the Schmidts' summary judgment motion, the Rechlitzes stated, "Plaintiffs clearly appreciate that an expert is necessary to show causation …." In addition, at the hearing on the Schmidts' motion, the Rechlitzes stated, "As far as the expert witness, we had an expert witness; and recently he has changed his opinion at least in part, and we are going to need to get an additional or different expert witness in this case."

At the later hearing on Huxhold's motion for summary judgment, the Rechlitzes again said that a problem had developed with their expert because he had changed his opinion and, in fact, the witness had now provided Huxhold with an affidavit

in support of the summary judgment request.[1] When the trial court observed that this development appeared to leave the Rechlitzes without an expert witness, the Rechlitzes responded that they were contacting other potential experts "to see whether or not there is anything he can offer in support of this …."

In the face of this record, it is hardly remarkable that the trial court granted the motions for summary judgment. The Rechlitzes not only conceded that they needed such a witness, but asserted that they were still trying to locate one.[2] The trial court's ruling was literally invited by the Rechlitzes. We will not review invited error. *See* ***Shawn B.N. v. State***, 173 Wis.2d 343, 372, 497 N.W.2d 141, 151 (Ct. App. 1992). We therefore uphold the trial court's initial ruling granting summary judgment to both the Schmidts and Huxhold.[3]

The Rechlitzes also complain that the trial court did not address their oral motion made during the course of the summary judgment proceedings asking leave to amend their complaint to allege that Huxhold had negligently failed to stabilize the property. However, we fail to see how the trial court's summary judgment ruling would have been any different if such an additional negligent act were pled. Like the cause of

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[1] That the Rechlitzes represented that they needed an expert witness is bolstered by the fact that they supplied the affidavit of their supposed expert, Vernon Gerth, the City of Kenosha building inspector, in opposition to Huxhold's summary judgment motion. Gerth's affidavit, however, opines that the failure to stabilize the property "*may* have been a contributing factor to the flooding of the [Rechlitzes'] property …." (Emphasis added.) Gerth's opinion was not admissible expert testimony because it was couched in terms of "may" rather than in terms of the requisite degree of certainty. As such, it stands as speculation. Summary judgment evidence must be admissible evidence. *See* § 802.08(3), STATS.

[2] The trial was scheduled for January 18, 1996, just slightly over one month from the date of the summary judgment hearing.

[3] We also observe that the Schmidts would have been entitled to dismissal based on the first step of summary judgment methodology—whether the complaint states a cause of action. *See* ***Green Spring Farms v. Kersten***, 136 Wis.2d 304, 315, 401 N.W.2d 816, 820 (1987). As we have noted, the complaint made no allegations of negligence against the Schmidts.

action already pled, the Rechlitzes made no representation that they were prepared to offer any expert evidence on this additional theory of negligence. In short, the Rechlitzes have not shown that they were prejudiced by the trial court's failure to expressly address this request.

The Rechlitzes then brought a motion for reconsideration stating that the motion was brought pursuant to § 805.17(3), STATS. However, the Rechlitzes' argument in support of their motion was a complete reversal of their earlier position. Now, for the first time, they argued, both in their supporting brief and at the hearing, that the trial court had erroneously ruled that they were required to present expert testimony in support of their causation allegation. Huxhold's brief in opposition argued on a threshold basis that reconsideration relief under § 805.17(3) was inappropriate since that statute dealt with reconsideration of findings of fact or conclusions of law following trial to a court. Instead, Huxhold argued that the Rechlitzes were required to appeal the court's earlier ruling. The trial court denied the motion, harkening back to its earlier rulings.

On a slightly different basis, we agree with Huxhold that the Rechlitzes' reconsideration motion was improvidently brought. In ***O'Neill v. Buchanan***, 186 Wis.2d 229, 519 N.W.2d 750 (Ct. App. 1994), we concluded that a motion for reconsideration was erroneously granted, stating that the appropriate relief was a motion to reopen under § 806.07, STATS. *See* ***O'Neill***, 186 Wis.2d at 234-35, 519 N.W.2d at 752. "In contrast," we said, "[a motion for] reconsideration assumes that the question has previously been considered. If a party has not … presented arguments in the litigation, the court has not considered that party's arguments in the first instance." ***Id.*** at 234, 519 N.W.2d at 752. We went on to state that, absent a showing of grounds for relief under § 806.07, the party "waived his opportunity to present his argument …." ***Id.*** at 235, 519 N.W.2d at 752. "To hold otherwise," we said,

> would allow a litigant to resurrect an issue laid to rest by virtue of waiver, abandonment, stipulation or concession under the guise of reconsideration. Our conclusion provides finality as to orders or judgments rendered by the court and promotes judicial economy by requiring arguments to be presented at the time scheduled in the litigation …. Any injustice this rule affords litigants is justified by these public policy concerns as well as the knowledge that the litigants affected brought about the situation through their own neglect and inaction.

Id. at 235, 519 N.W.2d at 752-53.[4]

The Rechlitzes' reconsideration argument not only introduced a new legal theory into the case (which, in and of itself, is prohibited by the limits on the reconsideration rule), it also introduced a new theory which the Rechlitzes themselves

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[4] In ***Rothwell Cotton Co. v. Rosenthal & Co.***, 827 F.2d 246 (7th Cir. 1987), the Court of Appeals for the Seventh Circuit discussed the purpose of motions for reconsideration:

> "Motions for reconsideration serve a limited function; to correct manifest errors of law or fact or to present newly discovered evidence. Such motions cannot in any case be employed as a vehicle to introduce new evidence that could have been adduced during pendency of the summary judgment motion. … Nor should a motion for reconsideration serve as the occasion to tender new legal theories for the first time."

Id. at 251 (quoting ***Keene Corp. v. International Fidelity Ins. Co.***, 561 F. Supp. 656, 665-66 (N.D. Ill. 1982), *aff'd*, 736 F.2d 388 (7th Cir. 1984)).

had previously argued against. Under these circumstances, we conclude that application of the rule is all the more appropriate.

CONCLUSION

We affirm the trial court's grant of summary judgment.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.